

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

NATIONAL CARPENTRY
CONTRACTORS

Employer

and

UNITED BROTHERHOOD OF
CARPENTERS & JOINERS OF AMERICA,
A/W NEW ENGLAND REGIONAL
COUNCIL OF CARPENTERS

Petitioner

Case 1-RC-22133

SUPPLEMENTAL DECISION AND ORDER

On January 11, 2008, I issued a Decision and Order in this matter finding, in agreement with the Employer, that it would be inappropriate to direct an election in the petitioned-for unit of about twenty full-time and regular part-time carpenters because it had completed its work at two construction projects located in Woburn and Lexington, Massachusetts (Avalon Woburn and Avalon Lexington, respectively) and is not presently performing any work in Massachusetts. Therefore, I did not reach the Employer's alternate contention that the petition should be dismissed because it does not employ any of the carpenters whom the Union seeks to represent, but rather, only employs superintendents¹ who manage the work of various subcontractors, and that it is these subcontractors who employ the carpenters the Union is seeking to represent, including those who worked at Avalon Woburn and Avalon Lexington.

Thereafter, on January 15, 2008, the Union filed a Motion for Reconsideration and Revocation of my dismissal of its petition. In its motion, the Union argues that although work at Avalon Woburn and Avalon Lexington has been completed, the Employer admitted it had two upcoming projects on which work was about to start, although it refused to identify them. Therefore, the Union argues that I erred in

¹ The Union stipulated that it does not seek to represent the Employer's superintendents.

dismissing the Union's petition on the grounds that there is no evidence the Employer will have any work for the petitioned-for employees in the future.

Having reconsidered the record, I find, in agreement with the Union, that there is sufficient evidence that, in the future, the Employer is likely to perform work within the geographical area in which the Union seeks to represent the employees in question. Therefore, I grant the Union's motion and rescind my earlier determination that directing an election would be inappropriate based on the Employer's cessation of work. As discussed more fully below, however, I find that the record evidence fails to establish that the Employer employs the petitioned-for employees and, accordingly, I shall dismiss the petition on that basis.

I. FACTS

A. Background and Overview of the Employer's Business

As set forth in the original Decision and Order in this matter, the Employer is a Stamford, Connecticut-based sole-proprietorship owned by John Kirk that operates as a commercial carpentry general contractor providing construction management services to large apartment complex builders, such as Avalon Bay Communities, Inc. (Avalon). The Employer, in turn, subcontracts with metal stud companies, window and door companies, masonry companies, vinyl and wood siding companies, and aluminum trim and façade companies, to perform the work needed on any particular project, and uses its superintendents to oversee the work of the subcontractors.

According to Kirk, all of the Employer's subcontractors are registered as such in Massachusetts, and the Employer requires them to provide proof of workers' compensation insurance, liability certificates of compliance, and credit and trade references, and to enter into written subcontracts with the Employer. The Employer only pays its subcontractors by check in their respective company names and keeps records of all such transactions.² The Employer provides power generators, forklifts, safety equipment, and nails to its subcontractors, but does not supply them with any tools.

The Employer's subcontractors decide whom to hire and are solely responsible for establishing the wages and benefits these individuals receive. The Employer never directly pays any individuals whom these subcontractors employ.

² In this regard, the Employer produced records of payments it made and copies of checks it issued to a carpentry subcontractor, Right Angle Construction Co. (Right Angle), in connection with the Avalon Woburn project. Right Angle's principal is Employer superintendent Edwin Narvaez.

B. The Avalon Woburn and Avalon Lexington Projects

1. The Work Performed

The Employer began working on Avalon Woburn in about December 2005, and completed the project sometime between May and July 2007. Although it is unclear when the Employer began working on Avalon Lexington, it ceased performing work on that project shortly after the July 23 and 30, 2007 hearing in this proceeding. The Employer assertedly has not performed any work in Massachusetts since completing Avalon Lexington. As noted above, however, the Employer admitted that it expected to begin work on two upcoming projects which it refused to identify.³

At Avalon Woburn, the Employer prepared preliminary estimates and ensured that all building materials met Avalon's specifications. The Employer and Avalon executed a written contract for Avalon Woburn that set forth, *inter alia*, the schedule, scope of work, insurance requirements, and delivery, storage, handling, and installation conditions.⁴ At Avalon Lexington, the Employer prepared preliminary lumber estimates, performed a structural engineering review, and hired lumber, panel, and truss companies. The Employer then hired various subcontractors for the work specified in connection with the Avalon Woburn and Avalon Lexington projects.⁵

Narvaez handles the Employer's projects in Massachusetts, and served as an Employer superintendent on both the Avalon Woburn and Avalon Lexington projects. Narvaez, through Right Angle, first worked as an Employer subcontractor at Avalon Woburn, and later also worked as an Employer superintendent at Avalon Woburn, when the superintendent who had been working at Avalon Woburn, Guillermo Endo, went to Connecticut to manage another project. According to Kirk, the Employer had also subcontracted with Right Angle to perform layout and detail work, which consists of marking window and door openings, point loads, and load transfers, at Avalon Lexington, but voided that contract prior to Right Angle beginning the work. Once Avalon Woburn was completed, Narvaez worked at Avalon Lexington, though only as an Employer superintendent.

³ While describing the bidding process, Kirk also referred to a project that Avalon "want[s] us to build in Sharon, Massachusetts...."

⁴ According to Kirk, the Employer executed a similar contract with Avalon for Avalon Lexington, although that contract was not placed in the record.

⁵ These subcontractors included Right Angle, Adrian Window & Door, Alveno Construction, Caballero Construction, Family Construction, Jose Framing, Chaparro Construction, Marco Lifts, Nelson Gonzales Construction, Campos Brothers Construction, Legua Drywall, Stephen Poulin Company, and Flavio Stairs. The hearing in this case was adjourned on July 30, 2007, and the Region subsequently issued subpoenas to all of the above-named subcontractors. All the subpoenas were returned as undeliverable, however, and on October 19, 2007, the Region issued an Order Closing Hearing and Setting Briefing Due Date.

2. The Employees

As noted in the original Decision and Order in this matter, two employees testified at the hearing. **Victor Guzman** and Juan Carlos Soto both worked at Avalon Woburn and Avalon Lexington. Juan Caballero, who owns Caballero Construction, and Edwin Narvaez, the Employer superintendent who also owns Right Angle Construction, hired Guzman in November 2006 to work at Avalon Woburn.⁶ Guzman worked at Avalon Woburn from December 2006 until May 2007, and, thereafter, worked at Avalon Lexington until approximately late June 2007, when he quit. Guzman neither completed nor received any employment-related documents in connection with his tenure at either Avalon Woburn or Avalon Lexington. Narvaez set Guzman's wage rate, and he was paid in cash, either by Caballero, Narvaez, or Edwin Narvaez, Jr.⁷ Guzman and other workers were sometimes paid at the jobsite and sometimes at an apartment in Lawrence, Massachusetts, that Guzman identified as Narvaez's.

Prior to March 2007, Caballero or Narvaez directed Guzman's work at Avalon Woburn. After March 2007, Narvaez, Jr. or Employer superintendent Juan Campos directed Guzman's work there. Guzman used tools provided to him at the jobsite, but he did not know who owned them. While working at Avalon Lexington, Narvaez directed his work.

Juan Carlos Soto worked at Avalon Woburn from approximately September 2006 to April 2007, and at Avalon Lexington for about a month after that. Narvaez hired Soto in person in Connecticut, set his initial wage rate, and drove him from Connecticut to the Avalon Woburn site for his first day of work there. Soto neither completed nor received any employment-related documents in connection with his tenure at either Avalon Woburn or Avalon Lexington. Soto originally worked picking up trash, and then worked putting in floors, fixing walls, and occasionally putting in windows for various "contractors" at Avalon Woburn that Narvaez indicated he would be helping.⁸ Narvaez or these "contractors" paid Soto in cash. Narvaez provided Soto with tools when he worked at the Avalon Woburn project.

While at Avalon Lexington, Soto worked under Narvaez's direction and Narvaez paid him and five or six others in cash at Narvaez's apartment. A floor truss contractor

⁶ Caballero supposedly hired Guzman after asking Narvaez's permission to do so. A July 6, 2007 letter from Caballero Construction to the Employer lists Guzman as one of its employees at Avalon Woburn from August 2006 to April 2007. A July 7, 2007 letter from Alveno Construction to the Employer lists Guzman as an employee then on its payroll since March 2007; Guzman, however, denied working for Alveno Construction.

⁷ It is unclear what, if any, relationship Edwin Narvaez, Jr. has to the Employer, Right Angle, or any other subcontractor that worked at Avalon Woburn or Avalon Lexington.

⁸ Among the three "contractors" Soto referred to, he could only identify Caballero, for whom he worked the most, by name.

Soto could not identify raised Soto's wage rate to \$10 an hour, but Soto quit because he was not being paid.⁹

II. ANALYSIS AND CONCLUSION

The Original Decision and Order

At the hearing, the Employer admitted that it expected to begin work on two upcoming projects (although it refused to identify them), mentioned a future Avalon project in Sharon, Massachusetts, and stated that Narvaez handles the Employer's projects in Massachusetts. The record therefore establishes that, in the future, the Employer is likely to perform work within the geographical area in which the Union seeks to represent the employees in question. See, e.g., *Fish Engineering & Construction*, 308 NLRB 836, 836 (1992) (Board found it appropriate to direct an election where the employer had worked on four projects in the previous year, had two current projects at the time of the hearing, and had bid on another project set to commence approximately two months from the end of the employer's current project in the same geographic area as the unit sought). Accordingly, I rescind my earlier Order dismissing the Union's petition on the ground that the Employer had completed its work at the two construction projects located in Massachusetts and is not presently performing any work in Massachusetts.

The Supplemental Decision

Despite revoking my earlier determination that directing an election would be inappropriate because the Employer has ceased performing work within Massachusetts, I nevertheless find that there is insufficient evidence to establish that the Employer employs any of the carpenters whom the Union seeks to represent. I shall, therefore, dismiss the petition on that basis.

Guzman testified that Caballero hired him to work on the Avalon Woburn project with Narvaez's permission and that Narvaez set his wage rate, and Soto testified that Narvaez hired him in Connecticut to work at Avalon Woburn and set his wage rate.¹⁰ It is not clear, however, whether Narvaez was acting in his capacity as the principal of Right Angle (which was among the subcontractors that worked on Avalon Woburn), or in his capacity as an Employer superintendent in these instances. If Narvaez was acting on Right Angle's behalf, his doing so is consistent with Kirk's testimony that the Employer's subcontractors decide whom to hire and are solely responsible for setting the wages and benefits these individuals receive.¹¹ Additionally, there is no clear evidence that the

⁹ Soto claimed he is owed a total of \$850, \$200 from Caballero and the balance from Narvaez, for work he performed at Avalon Lexington.

¹⁰ As already noted, Soto also received a raise from a floor truss contractor he could not identify.

¹¹ The fact that neither Guzman nor Soto completed or received any employment-related documents in connection with their work at Avalon Woburn or Avalon Lexington neither adds to or detracts from Kirk's testimony that the employees at issue were employed by subcontractors

Employer paid any of the carpenters who worked at Avalon Woburn. Thus, Guzman was paid in cash by Caballero (identified as a subcontractor), Narvaez, who may have been acting in his capacity as principal of Right Angle, or Narvaez, Jr., whose relationship, if any, to the Employer, Right Angle, or any other subcontractor was never established, while Soto was paid in cash by Narvaez or various "contractors" he did not identify.¹² Soto's testimony that Narvaez provided him with tools at Avalon Woburn does not contradict Kirk's testimony that the Employer does not provide its subcontractors with tools, and Guzman simply testified that tools were available for him to use at the jobsite, but he did not know who owned them.

Soto did testify, however, that, while working at Avalon Lexington, Narvaez, who only worked as an Employer superintendent at Avalon Lexington and whose company, Right Angle, performed no work there, paid him and others. In addition, Guzman testified that Narvaez and Employer superintendent Juan Campos at times directed his work at Avalon Woburn and that Narvaez supervised him at Avalon Lexington, and Soto testified that at Avalon Lexington, Narvaez directed his work. The fact that the Employer may have exercised some supervisory authority over the employees working at the two Avalon projects, or that it may have paid employees directly, or participated in their hiring, or set their initial wage rates, or provided them with tools does not, however, provide conclusive evidence that it was the Employer alone who employed them. Such evidence is also consistent with the possibility that the Employer and its subcontractors were joint employers of the carpenters at issue. Viewed in the light most favorable to the Union, I conclude that the record evidence¹³ here fails to establish anything more than the possibility that the Employer was a joint employer with its subcontractors of the carpenters in issue. See *Aldworth Co., Inc.*, 338 NLRB 137, 139 (2002). Inasmuch as the Union, at the hearing, took the position that it sought to represent the employees in question only if they were employed solely by the Employer, and as the record evidence fails to establish that the Employer is the sole employer of the petitioned-for employees, I shall dismiss the petition.

and not by the Employer. On the other hand, there is no explanation of why, if Narvaez was acting on Right Angle's behalf, Caballero, as another subcontractor, would need Right Angle's permission to hire Guzman, or why Right Angle would set Guzman's wage rate.

¹² Kirk testified that the Employer never directly pays its subcontractors' employees and that it only pays its subcontractors by check in their respective company names. The Union placed copies of checks issued by the Employer to Narvaez's company, Right Angle, into evidence. The fact that the Employer paid Right Angle by check is not inconsistent with Right Angle, in turn, paying the carpenters in cash.

¹³ In its brief, the Union requests that I draw an adverse inference with respect to the Employer's failure to call its superintendent, Edwin Narvaez, to testify in this matter. A preelection hearing, however, is investigatory in nature and credibility resolutions are not made. Accordingly, the evidentiary rule supporting adverse inferences does not apply here. *Marian Manor for the Aged and Infirm, Inc.*, 333 NLRB 1084 (2001).

ORDER

IT IS HEREBY ORDERED that the petition is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision, clarification of Bargaining Unit, and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by February 6, 2008.

The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

/s/ Rosemary Pye

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Dated at Boston, Massachusetts
this 23rd day of January, 2008.